

JAN 19 2006

FEDERAL ELECTION
COMMISSION
SECRETARIAT

FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463

2006 JAN 19 A 10: 37

FIRST GENERAL COUNSEL'S REPORT

SENSITIVE

MUR 5583
DATE COMPLAINT FILED: October 25, 2004
DATE OF NOTIFICATION: November 1, 2004;
LAST RESPONSE RECEIVED: November 16, 2004
DATE ACTIVATED: September 29, 2005

EXPIRATION OF SOL: April 29, 2009

COMPLAINANT: South Dakota Republican Party

RESPONDENTS: Unknown Respondents, also known as someone who loves Jesus and
friends of swlj
www.formarriage.org
Christian Interactive Network

**RELEVANT STATUTES
AND REGULATIONS:**

2 U.S.C. §434(b)
2 U.S.C. §434(c)
2 U.S.C. §434(g)
2 U.S.C. §441d
2 U.S.C. §441b
2 U.S.C. §441c
2 U.S.C. §441e
2 U.S.C. §441f
11 C.F.R. §109.10(b)
11 C.F.R. §110.1(b)

INTERNAL REPORTS CHECKED: FEC Disclosure Reports

FEDERAL AGENCIES CHECKED: None

I. INTRODUCTION

In October 2004, reportedly "well over 1,000" mailings expressly advocating the election or defeat of Senator Daschle, were sent to churches across the state of South Dakota, purportedly paid for by "someone who loves Jesus and friends of swIJ." The South Dakota Republican Party ("SDRP"), which filed the complaint in this case, provided a photocopy of the entire mailing, including the envelope, flyer and sticker, but stated it was not responsible for the mailing nor had any knowledge of who was responsible.² We were unable to locate any group or organization by the name of "someone who loves Jesus and friends of swIJ."

As discussed in more detail below, this Office recommends that the Commission find reason to believe that Unknown Respondents, also known as "someone who loves Jesus and friends of swIJ," may have violated the disclaimer, prohibited contributions, and independent expenditure reporting provisions of the Federal Election Campaign Act of 1971, as amended (the "Act"), and authorize an investigation.

II. FACTUAL BACKGROUND

The mailing included a two-sided flyer, a sticker, and an envelope containing the items. See Attachment 1. The flyer begins by stating that "Senator Tom Daschle is a very important man in Washington, if he wants to do something **he can get it done very quickly.**" (Emphasis in original). Further in the body, the flyer pleads with "my fellow Christians" to call their "senator(s) and ask them to support" the Federal Marriage Protection Amendment, the House of Worship Free Speech Restoration Act, and the Pledge Protection Act. At the bottom of the front side of the flyer the following exhortation appears: **"Finally if Senator Tom Daschle makes the effort to support**

² Senator Daschle's campaign headquarters received a number of mailings because the headquarters' address is the return address on the envelope. The Daschle headquarters forwarded the mailings to the SDRP, believing it was responsible. The Daschle campaign also reportedly filed criminal charges with state authorities. See Jennifer Anderson, *New Charges Fuel Senate Race*, ARGUS LEADER, Oct. 21, 2004, at 1B.

1 and pass these three bills before the November election please give him your vote. However,
2 if he does not, please do not, for the other guy certainly would." (Emphasis in the original).

3 See Attachment 1 at 1.

4 The reverse side of the flyer includes a brief discussion of each of the bills mentioned, with
5 additional commentary. Following that discussion, the flyer states: "Please ask your
6 parishioners to call Sen. Tom Daschle asking him to Support and Pass all three of these bills
7 before the November 2 Election! If he does, please give him your vote. If he does not, please
8 do not!" (Emphasis in the original).

9 The last paragraph of the flyer states: "Freedom of Speech, is not Free!" (Emphasis in
10 the original). It then details the costs for the mailing, including costs for the enclosed sticker, the
11 envelope, the stamp, and the flyer, concluding that each mailing cost a total of \$1.62.

12 See Attachment 1 at 2. Since "well over 1,000" mailings reportedly were sent to churches in
13 South Dakota, *see* ANDERSON, *supra*, note 2, the likely minimum cost of this communication is at
14 least \$1,620.

15 The first two lines of the enclosed sticker, which is approximately 7¼ x 3¼ inches, reads
16 in large font: "Vote for Daschle & Vote for SODOMY." (Emphasis in the original). The third
17 line reads: "Know The Facts: www.formarriage.org." At the bottom, in a box set off from the rest
18 of the communication, is the following disclaimer: "Paid for by someone who loves Jesus and
19 friends of swlJ. This ad is not authorized by any candidate of [sic] candidate committee." See
20 Attachment 1 at 3.

21 The postmark on the envelope that contained the flyer and sticker shows only an October
22 5, 2004 date and a Sioux Falls, South Dakota origin. See Attachment 1 at 4. No bulk permit
23 number or other identifying mark is anywhere on the envelope. The mailings were sent using

1 first-class stamps. The return addressee on the envelope containing the mailing is "S.T.D.HQ"
2 followed by Daschle's campaign headquarters address. Below the address is the statement: "If
3 you need more stickers, please call above at 605-334-9995." This number is for Daschle's
4 campaign in Sioux Falls. "Please Call 800-424-9094 As To Pros or Cons On This Mailer" is
5 printed on the bottom left-hand corner of the envelope. This phone number is the Daschle
6 constituent line to his Senate office in Washington, D.C.

7 There is no record of a person or entity called "someone who loves Jesus" or "friends of
8 swIJ" in the FEC Disclosure Reports database, nor has this Office been able to locate any person
9 or entity with this name in public sources of information.

10 The website www.formarriage.org, referenced on the sticker, is the Marriage Amendment
11 Project's site. Due to the reference, the organization was notified of the complaint. In its
12 response, the organization claims it did not authorize the mailing and that the website was used
13 without its knowledge or consent. In addition, the Christian Interactive Network ("Network"), an
14 internet hosting service for The Marriage Amendment Project's website, was notified of the
15 complaint. Its response states that the "Christian Interactive Network has no affiliation with
16 www.formarriage.org other than on a technical level by supplying Internet hosting services." Its
17 response also states that the Network has no management or influence over the website with
18 respect to the content, use or display of the site.³

³ As noted, the return addressee on the communication in issue here was "S.T.D. HQ.," *see* Attachment 1 at 4, which could be an acronym for Senator Tom Daschle's Headquarters. According to a newspaper article, there is a college Republican group at Augustana College in Sioux Falls, South Dakota, who called themselves "S.T.D.," which stood for "Stop Tom Daschle." The group reportedly created t-shirts during the 2004 election with the logo "Get rid of your S.T.D." *See* ANDERSON, *supra*, note 2. The college group reportedly denied involvement with the mailing, *id*, and at the present time we do not have any other evidence to link this group to it.

1 **III. ANALYSIS**

2 At this time, we have no immediate leads as to the person(s) responsible for the mailing.

3 Locating the appropriate respondent(s) may change the potential violations in this case, depending
4 on the nature, number, and regulated status of the person(s) authorizing and paying for the
5 communication. At this point, the possible violations appear to include improper disclaimers, use
6 of prohibited monies, and failure to report an independent expenditure. These possible violations
7 are discussed below.

8 **1. Disclaimer Violation**

9 The Federal Election Campaign Act of 1971, as amended (the "Act"), provides that
10 whenever any person makes an expenditure for the purpose of financing a communication
11 expressly advocating the election or defeat of a clearly identified candidate, such communication
12 must include a disclaimer clearly stating the name of the person who paid for the communication
13 and indicating whether the communication was authorized by any candidate or candidate's
14 authorized committee. *See* 2 U.S.C. §441d(a); *see also* 11 C.F.R. §110.11.

15 The flyer contains express advocacy under 11 C.F.R. §100.22(a) because it includes
16 phrases that are similar to those set forth in that regulation. The regulation defines "expressly
17 advocating" as a communication that uses phrases such as "'vote for the President,' or 'support the
18 Democratic nominee,'... 'vote against Old Hickory,'... or individual word(s) which in context can
19 have no other reasonable meaning than to urge the election or defeat of one or more clearly
20 identified candidate(s)..." The flyer in this matter specifically calls upon voters to "please give
21 [Daschle] your vote" or "please do not" depending on whether he supports and passes certain
22 legislation.

1 The flyer and sticker would be considered as two separate items, each requiring a
2 disclaimer, unless exempted from the requirement. *See* 11 C.F.R. §110.11(c)(2)(v). While the
3 sticker, which had a disclaimer identifying the unknown respondents, is among the items
4 exempted from disclaimer requirements under 11 C.F.R. §110.11(f)(i)⁴, the flyer was required to
5 contain an adequate disclaimer, but did not contain one at all.

6 Furthermore, it appears that the person(s) responsible for the mailing wanted to remain
7 unknown.⁵ On the return address position on the envelope, such person(s) did not include their
8 own names and utilized Senator Daschle's campaign headquarters' address. The names in the
9 disclaimer on the sticker have not been traced by the press or this Office to any existing group.
10 Accordingly, the person(s) who authorized and paid for these communications may have
11 knowingly and willfully violated Section 441d(a). *See* MUR 4919 (East Bay Committee)
12 (Commission found reason to believe Unknown Respondents knowingly and willfully violated
13 2 U.S.C. §441d(a) where the name on the communication could not be traced to an existing
14 group).

15 2. Prohibited Source or Independent Expenditure Reporting Violations

16 It is possible that the funds supporting the mailing may have originated from a prohibited
17 source or sources, depending on the nature of the person(s) or organization(s) paying for the
18 mailing. *See* 2 U.S.C. §§441b (corporations and labor organizations), 441c (government

⁴ 11 C.F.R. §110.11(f)(i) exempts: "Bumper stickers, pins, buttons, pens, and similar small items upon which the disclaimer cannot be conveniently printed."

⁵ The First Amendment generally protects anonymous political speech. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995). However, fraudulent speech or misrepresentations that have the effect of corrupting elections and the democratic process are not afforded such protection. *See Garrison v. Louisiana*, 379 U.S. 64 (1964); *see also Federal Election Comm'n v. Public Citizen*, 268 F.3d 1283, 1283 (11th Cir. 2001) (holding that the "government's interest in assisting voters in evaluating candidates for public office was 'overriding' for First Amendment purposes" and that "the disclosure requirements of 441d are sufficiently narrowly drawn to promote that interest.").

1 contractors), 441e (foreign nationals), and 441f (in the name of another). Another possibility is
2 that the flyer may have been paid from a permissible source, but the source failed to file a required
3 report of independent expenditure. *See* 2 U.S.C. §431(17).

4 Independent expenditures by natural individuals are not limited by the Act, but those
5 expenditures in excess of \$250 with respect to a given calendar year must be reported.
6 *See* 2 U.S.C. §434(c); 11 C.F.R. §109.10(b). The timing and frequency of such filings depends on
7 the value of the expenditures and when they are made. *See* 11 C.F.R. § 109.10(b) (independent
8 expenditures aggregating \$250 or more are required to be reported in accordance with the
9 quarterly reporting schedule specified in 11 C.F.R. §104.5(a)(1)(i) and (ii));
10 2 U.S.C. §434(g)(2)(A) and 11 C.F.R. §109.10(c) (independent expenditures aggregating \$10,000
11 or more with respect to a given election up to and including the 20th day before an election, must
12 be reported within 48 hours of the date on which the communication is publicly distributed); and 2
13 U.S.C. §434(g)(1)(A) and 11 C.F.R. §109.10(d) (independent expenditures aggregating \$1,000 or
14 more made after the 20th day, but more than 24 hours before the day of an election, must be
15 reported within 24 hours following the date on which the communication is publicly distributed).

16 Similarly, a political committee, other than an authorized committee, must report
17 independent expenditures to the Commission. *See* 2 U.S.C. §434(b)(4)(H)(iii); and
18 §104.3(b)(1)(vii).

19 Based on the above, this Office recommends that the Commission find reason to believe
20 that Unknown Respondent(s), also known as "someone who loves Jesus and friends of swlj,"
21 violated 2 U.S.C. §§ 434(b), 434(c), 434(g), 441b, 441c, 441d, 441e, and 441f.⁶ We also

⁶ It is possible that this Office may recommend a reason to believe finding on a section 441h theory for possible fraudulent misrepresentation of campaign authority at a later date, but there is currently an insufficient basis upon which to make such a recommendation at this time. *See* 2 U.S.C. §441h.

1 recommend that the Commission find no reason to believe that www.formarriage.org and
2 Christian Interactive Network violated the Act or the Commission's regulations and close the file
3 as to those respondents. Both organizations denied involvement with the communication in issue
4 and we have no information to the contrary.

5 **III. PROPOSED DISCOVERY**

6 We propose a limited investigation to see whether information can be developed leading to
7 the identity of the person(s) responsible for the mailing.
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IV. RECOMMENDATIONS

1. Find reason to believe Unknown Respondent(s) also known as someone who loves Jesus and friends of swlJ violated 2 U.S.C. §§ 434(b), 434(c), 434(g), 441b, 441c, 441d, 441e and 441f.
2. Find no reason to believe www.formarriage.org violated the Federal Election Act of 1971, as amended, or the Commission's regulations, and close the file as to this respondent.
3. Find no reason to believe Christian Interactive Network violated the Federal Election Act of 1971, as amended, or the Commission's regulations, and close the file as to this respondent.
- 4.
5. Approve the appropriate letters.

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Attachment

1. Flyer, sticker, and envelope.